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(I)



# In the Supreme Court of the United States

OCTOBER TERM, 1941

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No. 1237

THE CONCORD COMPANY, A CORPORATION, PETITIONER

v.

WALTER R. WILL CUTS, RUTH WILL CUTS AND CECIL  
H. DEIGHTON, AS EXECUTORS OF THE WILL AND  
ESTATE OF L. M. WILL CUTS, COLLECTOR OF IN-  
TERNAL REVENUE OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## OPINIONS BELOW

The United States District Court for the District of Minnesota rendered no opinion except in overruling the taxpayer's motion for a new trial (R. 840-844). The opinion of the Circuit Court of Appeals (R. 876-886) is reported in 125 F. (2d) 584.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 9, 1942 (R. 886). A peti-

tion for rehearing was filed February 24, 1942 (R. 887-906) and denied March 7, 1942 (R. 907). The petition for a writ of certiorari was filed May 15, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTIONS PRESENTED

1. Whether the special interrogatory which the trial court submitted to the jury was valid under Rule 49 (a) of the Federal Rules of Civil Procedure and was appropriate to the jury's decision of the issues.

2. Whether there was any reversible error in the trial court's rulings on the admission of evidence.

#### STATUTE AND RULE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

\* \* \* \* \*

(b) *Property acquired before March 1, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be—

(1) the cost of such property (or, in the case of such property as is described in subsection (a) (1), (4), (5), or (12) of this section, the basis as therein provided; or

(2) the fair market value of such property as of March 1, 1913.

whichever is greater. In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date.

#### Federal Rules of Civil Procedure:

##### Rule 49. *Special Verdicts and Interrogatories.*

(a) SPECIAL VERDICTS. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

## STATEMENT

Petitioner brought this action against L. M. Willcutts, a collector of internal revenue, to recover a deficiency income tax amounting to \$29,042.34 with interest assessed against it for the taxable year ending February 28, 1930, and paid by it under protest in 1932 (R. 3-11, 768). The collector died prior to the trial, which was had before a jury, and respondents, who are his executors, were substituted as parties defendant (R. 13-15). The facts pertinent to the questions raised by the petition are not in dispute and may be stated as follows:

In 1922 upon its organization petitioner issued 20 shares of its own common stock to Joseph E. Clifford in a nontaxable exchange for 20 shares of common stock in Cream of Wheat Company. Clifford had owned the shares on and before March 1, 1913. There were on the latter date a total of 400 shares of Cream of Wheat common stock issued and outstanding. They were closely held and not listed on any exchange. The Cream of Wheat Company was reorganized in 1929 and 600,000 shares were issued to the stockholders in place of the 400 previously held by them. Petitioner received 30,000 of these new shares for the 20 old ones it had acquired from Clifford. Thereafter, during its fiscal year ending February 28, 1930, petitioner sold 13,110 of the 30,000 shares for \$484,545.60 (R. 769-770).



Petitioner reported a taxable gain of \$139,545.60 on the sale of these shares (R. 763). This amount represents the difference between the sale price and \$345,000, which petitioner estimated was the March 1, 1913, fair market value of the shares sold computed according to the per share value on that date of the 20 shares then held by petitioner, which it alleged was \$37,500 (R. 8). The Commissioner, in making his deficiency assessment, determined that the March 1, 1913, per share value of the 20 shares was only \$15,636.53 with the result that the shares sold had a basis of \$136,663.27 instead of \$345,000 and that, accordingly, petitioner's taxable gain was \$208,336.13 more than it reported (R. 764-765, 767).

The parties agreed by stipulation that the March 1, 1913, fair market value of each of the 20 shares was the proper basis to be used in determining petitioner's gain (R. 22-23). They agreed also that the only issue of fact to be submitted to the jury was the issue with respect to such value (R. 770). At the close of the evidence the trial judge charged the jury that petitioner had the burden of proving that the value of the stock was in excess of the value found by the Commissioner (R. 753-754, 756). He concluded the charge with an explanation and submission of the following questions for answer by special verdict (R. 756-758, 761):

1. Has the plaintiff established by a fair preponderance of the evidence that on

March 1, 1913, the fair market value of the 400 shares of Cream of Wheat stock was an amount in excess of the value determined by the Commissioner?

NOTE.—If your answer to the above question is “no,” then the following question may be disregarded.

2. What was the March 1, 1913, fair market value per share (before the 1500 to 1 split-up) of the Cream of Wheat stock in question?

Neither party objected to the charge. However, prior to the charge petitioner objected to the submission of the first question to the jury and contended that only the second question should have been submitted (R. 742, 843).

The special verdict returned by the jury answered the first question “No” and, accordingly, did not answer the second question (R. 761). The trial judge thereupon made findings of fact, which adopted the verdict, and conclusions of law (R. 762-771). Judgment dismissing the action was entered (R. 772) and petitioner’s motion for a new trial denied with opinion (R. 840-844). The Circuit Court of Appeals affirmed the judgment (R. 886) and denied a petition for rehearing (R. 907).

#### ARGUMENT

1. Petitioner contends (Pet. 14-27) on several grounds that the trial court erred in submitting the first question to the jury. The record fails to disclose, however, that any of these grounds was

specified by petitioner when at the trial it objected to the question (R. 742-743). Moreover, none of them is valid.

The first question was framed to put to the jury the precise issue initially presented by the case, namely, whether petitioner had sustained its burden of proving that the stock involved had a greater value than the value found by the Commissioner. See *Wickwire v. Reinecke*, 275 U. S. 101, 105; *Reinecke v. Spalding*, 280 U. S. 227, 232-233; *Burnet v. Houston*, 283 U. S. 223, 227-228; *Welch v. Helvering*, 290 U. S. 111, 115. To have submitted only the second question to the jury, in accordance with petitioner's contention (R. 742, Pet. 3), would have been to have ignored the effect of the Commissioner's determination and the petitioner's burden of proof.

The form of the first question did not imply, and the judge refused to charge (R. 741), that the Commissioner's determination was evidence of the value found. Nor was the question improper because, as is contended (Pet. 18-20), it called for a conclusion of law or of mixed law and fact. The issue whether a plaintiff has established a certain fact by a fair preponderance of the evidence, even if it could be said to involve a conclusion of law or a mixed question, is the kind of issue typically submitted to juries. Plainly, Rule 49 (a) of the Federal Rules of Civil Procedure (*supra*, p. 3) contains no provision prohibiting

the court from submitting such an issue for answer by special verdict.<sup>1</sup>

Petitioner argues (Pet. 20-21) that the question answered by the jury was improper for the further reason that it referred to the value of the 400 shares of Cream of Wheat stock originally issued rather than to the value only of the proportion of those shares represented by the 13,110 shares sold by petitioner. However, as was pointed out by the court below (R. 880), petitioner based its claim upon proof of the total value of the 400 shares, from which the per share value could be computed, and, therefore, it was proper and in no event prejudicial for the court to have framed the question as it did in order to present the issue in simple terms which would relieve the jury of making the purely mathematical calculation of the per share value. There is no suggestion that the shares varied in value.

2. In charging the jury, the trial judge explained that if the first question was answered "No" the case would be ended and there would be no occasion to determine the precise value of the stock (R. 756-757). Since petitioner did not ob-

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<sup>1</sup> In *Carpenter v. Baltimore & O. R. Co.*, 109 F. (2d) 375 (C. C. A. 6), cited by petitioner (Pet. 18, 19) as being in conflict with the decision in the instant case on this point, the special interrogatories put to the jury did not ask whether certain facts not deemed to involve propositions of law were proved by a preponderance of the evidence. They were held objectionable as calling for legal conclusions with respect to the existence of negligence and contributory negligence.

ject to any portion of the charge, it is in no position now to claim that this explanation of the effect of the jury's answer to the first question was reversible error under Rule 49 (a). Moreover, although in many cases it may be desirable for the jury not to be advised in advance by the court as to the effect of a particular special verdict, the Rule does not require such practice, especially where as in the present case the parties did not attempt to keep the jury in the dark on the matter or to have the court do so (R. 15-33, 38-39, 124, 841). See *Sicard v. Albenberg Co.*, 136 Wis. 622, 625-626.

3. Petitioner contends (Pet. 27-28) that the cross-examination of one of its witnesses, F. W. Clifford, was prejudicial in that it tended to incite the jury against petitioner. Again, however, no such contention was made at the trial or could be supported. (See R. 880.) The trial court in its opinion denying the motion for new trial stated that the cross-examination was made in good faith for purposes of impeachment (R. 841) and the court below agreed that no error was shown (R. 880-881).

4. Finally, petitioner urges (Pet. 29-30) that the court below erred in sustaining the action of the trial court in allowing the respondents, over petitioners' objection, to put in evidence certain charts and testimony as to the March 1, 1913, value of the Cream of Wheat stock based on comparisons with the value of the listed stock of competing companies. The authorities relied on,

however, while indicating that such evidence ordinarily may be entitled to little weight, do not hold that it is too speculative to be admitted.<sup>2</sup> The trial judge in his charge reviewed the parties' contentions with respect to the evidence and correctly left to the jury the question whether the competing companies were comparable with Cream of Wheat Company despite that the latter's stock was not listed or sold on the market (R. 749-753). No objection to this action was taken and there was ample other evidence to support the verdict based on facts with respect to Cream of Wheat's history, operations, and financial condition. (See R. 15-33, 881.)

#### CONCLUSION

The decision of the court below is correct and there is no conflict or other reason for review. The petition, therefore, should be denied.

Respectfully submitted.

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JUNE 1942.

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<sup>2</sup> *Estate of Jacob Fish*, 1 B. T. A. 882; *Geo. D. Harter Bank, Executor*, 38 B. T. A. 387, and *James Couzens*, 11 B. T. A. 1040, 1163, 1172.

